



**STATE OF TENNESSEE  
DEPARTMENT OF ENVIRONMENT AND CONSERVATION  
DIVISION OF WATER POLLUTION CONTROL  
401 Church Street  
L&C Annex 6th Floor  
Nashville, TN 37243-1534**

March 28, 2008

Mr. Richard Militana  
109 Holiday Court, Suite B-5  
Franklin, Tennessee 37064

**CERTIFIED MAIL  
RETURN RECEIPT REQUESTED  
RECEIPT #7006 0810 0000 1061 7344**

Subject: DIRECTOR'S ORDER NO. WPC08-0067  
MILITANA PROPERTY  
WILLIAMSON COUNTY, TENNESSEE

Dear Mr. Militana:

Enclosed is a Director's Order and Assessment of Civil Penalty issued by Paul E. Davis, Director of the Division of Water Pollution Control, under the delegation of Commissioner James H. Fyke. Read the Order carefully and pay special attention to the NOTICE OF RIGHTS section.

Corporations, limited partnerships, limited liability companies, and other artificial entities created by law must be represented in any legal proceeding resulting from an appeal of this Order and Assessment by an attorney licensed to practice law in the State of Tennessee. Non-attorneys may participate in any such proceedings to the extent allowed by law.

If you or your attorney has questions concerning this correspondence, contact Mark Jordan at (615) 532-0675.

Sincerely,



Patrick N. Parker, Manager  
Enforcement and Compliance Section

PNP:MAJ

cc: DWPC – EFO-Memphis  
DWPC – Compliance File  
OGC

**STATE OF TENNESSEE  
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

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**IN THE MATTER OF:**

**RICHARD MILITANA**

**RESPONDENT**

)  
)  
)  
) **DIVISION OF WATER  
POLLUTION CONTROL**  
)

) **CASE NUMBER WPC08-0067**  
)

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**DIRECTOR'S ORDER AND ASSESSMENT**

NOW COMES Paul E. Davis, director of the Tennessee Division of Water Pollution Control, and states:

**PARTIES**

**I.**

Paul E. Davis is the duly appointed director of the Tennessee Division of Water Pollution Control by the commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "division" and the "department" respectively).

**II.**

Richard Militana (hereinafter the "Respondent") is a resident of the state of Tennessee and is the owner of property located at 7487 Sleepy Hollow Road in Williamson County (hereinafter the "site"). Service of process may be made on the Respondent at 109 Holiday Court, Suite B-5, Franklin, Tennessee 37064.

## **JURISDICTION**

### **III.**

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) § 69-3-101 *et seq.*, the Water Quality Control Act (the “Act”), has occurred, or is about to occur, the commissioner may issue a complaint to the violator and the commissioner may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (the “Rule”). Pursuant to T.C.A. § 69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

### **IV.**

The Respondent is a “person” as defined by T.C.A. § 69-3-103(20) and as herein described, has violated the Act.

### **V.**

Pursuant to T.C.A. § 69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (hereinafter the “ARAP”) that is not governed by a general permit or a § 401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

## VI.

The unnamed wetland, described herein, is “waters of the state” as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, *Use Classifications for Surface Waters*, is contained in the *Rules of Tennessee Department of Environment and Conservation Division of Water Pollution Control Amendments*. Accordingly, these waters of the state are classified for the following uses: fish and aquatic life, recreation, irrigation, livestock watering and wildlife.

## **FACTS**

## VII.

On October 20, 2005, the division and the U.S. Army Corps of Engineers (USACOE) received complaints regarding the alteration of possible wetlands at the site.

On October 21, 2005, personnel from the USACOE conducted a complaint investigation at the site and noted that alterations to approximately one acre of jurisdictional wetland that discharged to an unnamed tributary to Caney Fork Creek had occurred. USACOE personnel noted heavy equipment operating in the wetland and that a large ditch had been excavated through the middle of the wetland with the excavated material placed in the wetland on both sides of the ditch. USACOE personnel met with the Respondent and informed him that the work was unauthorized and in violation of the Section 404 of the Clean Water Act. USACOE personnel instructed the Respondent to restore the wetland to the extent possible and that the findings of the site visit would be forwarded to the State Division of Water Pollution Control. These findings, along with site photographs were forwarded to the division on October 25, 2005.

## **VIII.**

On October 25, 2005, division personnel from the Nashville Environmental Field Office (NEFO) conducted a complaint investigation and noted that a jurisdictional wetland that discharged to an unnamed tributary to Caney Fork Creek had been altered by the excavation of a ditch through the middle of the wetland. Excavated material had been placed in the wetland on both sides of the ditch, causing a condition of pollution. A subsequent file review determined that written authorization under an appropriate ARAP had not been requested or issued for this activity.

## **IX.**

On November 4, 2005, the division issued a Notice of Violation (NOV) to the Respondent for the violations noted during the October 25, 2005, complaint investigation. The Respondent was instructed to submit, within 30 days of receipt, a wetland delineation of the site, a determination of the total wetland area altered, and a plan to restore the wetland to its pre-existing condition.

## **X.**

On August 20, 2007, the division received a complaint that ponds were being constructed in the wetland area.

On August 22, 2007, division personnel conducted a complaint investigation and noted that construction of two small ponds was occurring in the wetland area observed during the October 25, 2005, complaint investigation. Areas of bare, unstable soil were noted around the perimeter of the ponds and excavated material had been placed in the wetland, causing a condition of pollution. A subsequent file review determined that the documents requested in the

November 4, 2005, NOV, had not been submitted and that written authorization under an appropriate ARAP for these activities had not been requested or issued.

## **XI.**

On September 10, 2007, the division issued a NOV to the Respondent for the violations noted during the August 22, 2007, complaint investigation. The Respondent was instructed to submit, within 30 days of receipt, a wetland delineation of the site, a determination of the total area of wetland altered, and a Corrective Action Plan (CAP) to restore the wetland to its original condition. The Respondent was advised that no additional work should occur in the wetland area without written authorization from the division.

## **XII.**

On February 21, 2008, division personnel conducted a site visit to assess compliance with the requirements of the previously issued NOVs, and noted that the construction of the two ponds had been completed, and the areas around the ponds had re-vegetated. A subsequent file review determined that the documents requested in the previously issued NOVs had not been submitted and that written authorization for the alteration activities had not been requested or issued.

## **XIII.**

On March 11, 2008, the division issued a NOV to the Respondent for failure to submit the documents requested in the September 10, 2007, NOV. The Respondent was instructed to submit, within 30 days of receipt, a wetland delineation, a determination of the total wetland acreage altered, and a CAP to restore the wetland to its original condition.

#### **XIV.**

On March 17, 2008, the Respondent submitted, via facsimile (FAX), a response to the March 11, 2008 NOV. This response included a copy of a FAX cover sheet and letter dated October 2, 2007. The FAX cover sheet indicated that these documents were submitted to the NEFO on October 2, 2007, in response to the September 10, 2007, NOV. However, a subsequent file review conducted by division personnel failed to locate the original documents. In the October 2, 2007, letter, the Respondent stated that the activities were exempt from permitting requirements due to the agricultural nature of the activities. Neither the October 2, 2007, letter nor the March 17, 2008, letter addressed the information requests contained in the September 10, 2007, NOV or the March 11, 2008, NOV.

#### **VIOLATIONS**

#### **XV.**

By altering waters of the state without authorization under an ARAP, and by failing to furnish requested information, the Respondent has violated T.C.A. §§ 69-3-108(a)-(b) and 114(b), which state in part:

§ 69-3-108(a):

Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit

§ 69-3-108(b):

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately

owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any Waters of the State;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
- (6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

§ 69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

## **XVI.**

By causing a condition of pollution in the unnamed wetland, the Respondent has violated

T.C.A. Section § 69-3-114(a), which states:

§ 69-3-114(a):

It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.



## **ORDER AND ASSESSMENT**

### **XVII.**

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-109, 69-3-115 and 69-3-116, I, Paul E. Davis, hereby issue the following ORDER AND ASSESSMENT to the Respondent.

1. The Respondent shall within 60 days of receipt of this ORDER AND ASSESSMENT, submit a Corrective Action Plan (CAP) for the restoration and reforestation of the wetland area altered and a wetland delineation, done by a qualified environmental professional, for the entire 3.83 acre property. The CAP shall include a component for the reforestation of the altered wetland and specify the species, size and quantity of trees. The altered wetland area shall be restored to the previous contour so as to restore original wetland hydrology. The wetland shall be reforested after the previous contours are established on site. The CAP shall include a component for the monitoring of the impacted wetland. This monitoring component shall include performance criteria, vegetative sampling, hydrology monitoring of the site and provide for annual reporting to the division for five years which shall include the replanting of non-surviving trees within the five year monitoring period. The monitoring reports shall be due annually on the date of CAP approval. The CAP shall be submitted for review and approval to the Water Pollution Control Manager in the NEFO at 711 R.S. Gass Boulevard, Nashville, Tennessee 37243 and a copy to the Enforcement and Compliance Section at 6<sup>th</sup> Floor L & C Annex, 401 Church Street, Nashville, Tennessee 37243. The Respondent shall correct any deficiencies the division finds and submit a corrected CAP within 30 days of notification of any deficiencies.

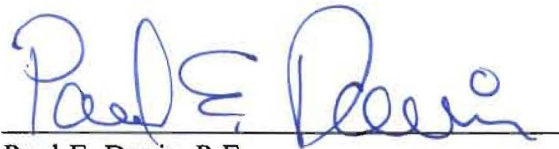
2. The Respondent shall, within 30 days of receiving approval from the division, initiate the actions outlined in the approved CAP and submit documentation on the date these activities are initiated. This documentation shall be submitted to the NEFO and a copy to the E&C at the respective addresses shown in Item 1.
3. The Respondent shall, within 6 months of approval, complete the actions contained in the CAP and submit documentation of completion to the NEFO and a copy to the E&C at the respective addresses shown in Item 1.
4. The Respondent shall pay a CIVIL PENALTY of TEN THOUSAND DOLLARS (\$10,000.00) to the division, hereby ASSESSED to be paid as follows:
  - a. The Respondent shall, within 30 days of entry of this ORDER, pay a CIVIL PENALTY in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00).
  - b. If the Respondent fails to comply with Part XVI, item 1 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00), payable within 30 days of default.
  - c. If the Respondent fails to comply with Part XVI, item 2 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00), payable within 30 days of default.
  - d. If the Respondent fails to comply with Part XVI, item 3 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00), payable within 30 days of default.

The Respondent shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The director may, for good cause shown, extend the compliance dates contained within this ORDER AND ASSESSMENT. In order to be eligible for this time extension, the Respondent shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension by the division will be in writing. Should the Respondent fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondent is advised that the foregoing ORDER AND ASSESSMENT is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the ORDER AND ASSESSMENT will be one factor considered in any decision whether to take enforcement action against the Respondent in the future.

Issued by the director of the Division of Water Pollution Control on behalf of the Commissioner of the Tennessee Department of Environment and Conservation on this 28<sup>th</sup> day of March 2008.



Paul E. Davis, P.E.  
Director, Division of Water Pollution Control

## **NOTICE OF RIGHTS**

Tennessee Code Annotated §§ 69-3-109, 115, allow any Respondent named herein to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the Department's Office of General Counsel a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within thirty (30) days of receiving this Order and Assessment. The petition should be sent to: "Appeal of Enforcement Order, TDEC-OGC, 20th Floor L & C Tower, 401 Church Street, Nashville, TN 37243-1548".

If the required written petition is not filed within thirty (30) days of receipt of this ORDER AND ASSESSMENT, the ORDER AND ASSESSMENT shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the ORDER AND ASSESSMENT will not be subject to review pursuant to T.C.A. §§ 69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. § 4-5-301 *et seq.* (the Uniform Administrative Procedures Act.) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payment of the civil penalty shall be made to "Treasurer, State of Tennessee" and shall be sent to the Division of Fiscal Services, Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14<sup>th</sup> Floor L & C Annex, 401 Church Street, Nashville, TN 37243. The case number, shown on the first page of this Order and Assessment, should be included on or with the payment. All other correspondence shall be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, 6<sup>th</sup> Floor L & C Annex, 401 Church Street, Nashville, TN 37243.